Care Center of Kansas City d/b/a/ Swope Ridge Geriatric Center *and* Service Employees International Union Local 2000, affiliated with Service Employees International Union. Cases 17–CA–23664, 17–CA–23679, and 17–CA–23680

June 25, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND KIRSANOW

On March 1, 2007, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs,[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] Because we affirm the judge's finding that the strikes were unprotected activity, we do not pass on his alternative finding that, had the strikes been protected activity, he would have found that the Respondent's adherence to its 2-hour call-in policy violated the Act. Similarly, we do not pass on the judge's alternative finding that the Respondent did not violate the Act by requiring striking employees to make up their missed weekend shifts.

[3] In his decision, the judge stated that the Union's intent to continue work stoppages as part of its underlying bargaining strategy, "absent any contrary evidence, may be clearly presumed." To the extent that this language can be read to suggest that a presumption exists as to such intent, and that the General Counsel has the burden to produce evidence sufficient to rebut that presumption, we note that such a reading is contrary to Board law. See, e.g., *Silver State Disposal Service,* 326 NLRB 84, 85 (1998) (respondent bears burden of showing that work stoppage is unprotected). In this case, the parties were unable to reach agreement on a wage increase. The Union issued three strike notices and engaged in two work stoppages, the third strike notice following only 1 day after the conclusion of the first strike. Moreover, the Union proffered no alternative reason for its conduct. Thus, we find that the strikes were part of the Union's bargaining strategy and, because the bargaining dispute continued with no evident changed purpose, there was a reasonable basis for finding that the pattern would continue. In these circumstances, the Respondent met its burden of proof.

Dated, Washington, D.C. June 25, 2007

Robert J. Battista, Chairman

Peter C. Schaumber, Member

Peter N. Kirsanow, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Lyn Buckley, Esq., for the General Counsel.
Rhonda Smiley, Esq. (McDowell, Rice, Smith & Buchanan), of Kansas City, Missouri, for the Respondent.
Gussie Winston, Business Representative, of Kansas City, Missouri, for the Union.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice a hearing in this matter was held before me in Overland Park, Kansas, on December 12 and 13, 2006. The initial charge in Case 17–CA–23664 was filed by Service Employees International Union Local 2000, affiliated with Service Employees International Union (Union) on August 28, 2006. Thereafter an amended charge was filed and a complaint, dated October 25, 2006, was issued. Thereafter related charges were filed, and on November 28, 2006, the Regional Director for Region 17 of the National Labor Relations Board (Board) issued an Order and notice of hearing alleging violations by Care Center of Kansas City d/b/a Swope Ridge Geriatric (Respondent) of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondent, in its answer to the complaint, duly filed, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel (General Counsel) and counsel for the Respondent. Upon the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation with its office and principal place of business located in Kansas City, Missouri, where it is engaged in the business of operating a nursing home. In the course and conduct of its business operations the Respondent annually derives gross revenues in excess of $100,000, and annually purchases and receives goods valued in excess of $5000 directly from points outside the state of Missouri. It is admitted and I find that the Respondent is, and at all material

times has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted, and I find, that The Union is and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act,

III. ALLEGED UNFAIR LABOR PRACTICES

A. Issues

The principal issues in this proceeding are whether employees engaged in protected activity by participating in strikes called by the Union, and, if so, whether the Respondent violated the Act by issuing warning notices to employees for failure to call in prior to participating in such strike activity.

B. Facts

The Union has been the collective-bargaining representative of the Respondent's employees for a number of years during which the parties have entered into a series of collective-bargaining agreements. The last collective-bargaining agreement extended from May 1, 2003 until April 30, 2006.[1]

The contract sets forth the collective bargaining unit as follows:

> Included: All regular full-time, regular part-time and regular limited part-time employees of the Employer, including team leaders.
>
> Excluded: Officers and managers, office and clerical employees, skilled craft workers, all therapy workers and diversional activities employees, all registered nurses, licensed practical nurses, all other professional and technical employees, on call employees, guards and supervisors as defined in the National Labor Relations Act.

The unit consists of approximately 40 employees. Most are Certified Nursing Assistants (CNA's), who care for the comfort of the residents and assist the residents with certain activities of daily living such as bathing, dressing, and feeding. The unit also includes several Certified Medical Technicians (CMT's) who primarily distribute and assist the residents with their medications.

Negotiations for a new contract took place before and after the expiration of the last contract and the parties were unable to reach a successor agreement. Insofar as the record shows the principal area of disagreement concerned the Union's demand for a wage increase larger that what the Respondent was offering. As a result the Union engaged in weekend strikes on two separate occasions.

As the Respondent is a health care institution the Union is required, pursuant to Section 8(g) of the Act, to notify the Respondent of a strike at least 10 days prior to such action, and to provide the date and time that such action will commence. The Union did provide the appropriate10-day strike notice prior to each anticipated strike action, as well as other notifications and clarifications, as follows.

On July 14, the Union, in a letter entitled "Ten- Day Notice to Strike," gave written notice that a strike would commence on Friday, August 4, at 11 p.m.

On August 2, 2 days prior to the announced strike, the Union sent two separate notices to the Respondent. One was a "Withdraw Notice" stating the Union was withdrawing the foregoing strike notice in order to give the Respondent and its agents "the opportunity to bargain in good faith and settle the CBA between both parties." The other was another "Ten-Day Notice to Strike," stating that a strike would commence on Saturday, August 26, at 2 p.m.

On August 24, 2 days prior to the scheduled August 26 strike, the Union advised the Respondent that the strike would be a 1 day (24 hour strike) that would commence at 2 p.m. on Saturday, August 26, and end at 2 p.m. on Sunday, August 27. Further, the Union advised the Respondent, "There will be a huge participation of members and outside supporters including other labor organizations of Change to Win."[2] This 24-hour strike occurred as scheduled.

On August 28, the day following the end of the first strike, the Union gave the Respondent another "Ten- Day Notice for a Strike," stating that it intended to strike again on Saturday, September 16, at 2 p.m.

On September 13, 3 days prior to the scheduled September 16 strike, the Union advised the Respondent that the strike would be a 1 day (24-hour) strike that would commence at 2 p.m. on Saturday, September 16, and end at 2 p.m. on Sunday, September 17. Again, in this notice, the Union advised the Respondent, "There will be a huge participation of members and outside supporters including other labor organizations of Change to Win." This 24-hour strike also occurred as scheduled.

Dorothy Jones, vice-president in charge of nursing services, described the picket line activity she observed. Jones testified that on August 26, the first day of the first strike, she was shocked that individuals on the picket line, in the presence of union representatives, were very loud, that they were yelling profanities and vulgarities through bullhorns, and that they had sirens going in order to draw attention to their demonstration. This was very disruptive and disconcerting to the residents of the nursing home, and to the surrounding residences in the area. According to Jones, individuals yelled through bullhorns, "Dorothy Jones and Patricia Wyatt,[3] we know where you live." Jones testified she took this as a threat. The sirens went all day and all night except during the times the police were present in response to the repeated calls of the Respondent. Thus, the noise only stopped while the police were there. Also, according to Jones, Michael Brown, vice president of the Union was constantly beating on a drum and trespassing on Respondent's property. Some of the residents remained awake, looking out the windows, as the noise was keeping them from sleeping. On

[1] All dates or time periods hereinafter are within 2006 unless otherwise indicated.

[2] Apparently "Change to Win" is the name given to a coalition of labor organizations established to promote union solidarity and to assist each other in situations such as the union activities herein.

[3] Wyatt was apparently another manager or supervisor of the Respondent.

one occasion, Sterling Brown, a union business agent, said over the bullhorn, "how would they feel if we burn this. . . MF'ing building down."

Jones testified that again, during the September 16-17 strike, an individual on the picket line yelled, "Dorothy Jones, I know where you live, why don't you come out and talk to us." According to Jones, "The behavior was still just as aggressive and vulgar as it had been the previous strike." Again, individuals on the picket line were using the bullhorn, the sirens, and the drum.[4] Further, they were blocking the driveway of the facility and would attempt to shove petitions in automobiles as they entered the driveway. Sometimes cars exiting from the driveway would stop for inordinate periods of time because the drivers could not tell whether the siren was from an approaching emergency vehicle. Jones saw one exiting car being banged on by an individual on the picket line, and observed individuals actually lying down and sprawling out on the driveway.

No union representatives were called as witnesses to rebut the testimony of Jones. However, as a rebuttal witness, the General Counsel called Henry Klein, who is a candidate for Mayor of Kansas City. Kline had been invited by the Union to participate in the picketing, and did so during both strikes. Klein testified that during the times he spent on the picket line, namely, about a total of 10 hours on three separate occasions, there was sometimes a bullhorn being used and sometimes a drum. He was not aware of a siren being used. Nor was he aware of any threats being uttered, or of people lying on the driveway or blocking traffic. He testified that he "considered it to be a very peaceful rally."

The testimony of Jones and Klein is not necessarily inconsistent. Klein may simply not have observed or heard what Jones observed and heard. However the record evidence indicates that Union Representative Gussie Winston was present on the picket line for substantial periods of time during both strikes; and although Winston, who entered an appearance on the record as the designated union representative, was present throughout the hearing and was even called as a witness by the Respondent following Jones' foregoing testimony, Winston did not rebut the testimony of Jones regarding the picket line and related conduct during the strike. Accordingly, I credit Jones' account of the strike activity.

The record shows that of the approximately 40 unit employees, only about 6 or 7 honored the picket lines and/or participated in picketing. Thus, only a few of the individuals on the picket lines were employees. The Respondent does not contend that any striking employees, all of whom returned to their regular shifts after the strikes, engaged in picket line misconduct.

The record also shows that the Respondent was well prepared for the strikes and that there was no disruption of services and care for the residents. Jones testified that the Respondent did not know whether employees would work or not during the strike: "There were employees who told us that they would be there, but we didn't know who would show up and who wouldn't show up. So we had called agency and given them notice that we may be doing some last minute calls for staffing."

As noted, the striking employees were not disciplined for picket line misconduct or for condoning such misconduct. However, those employees who were scheduled to work and had not notified the Respondent of their intention to be absent from work were given written disciplinary warnings for failing to adhere to the Respondent's call-in requirement. Thus, the Respondent has maintained a long-standing policy of issuing written warnings to employees for failing to notify the Respondent at least 2 hours in advance if they will be absent from their scheduled shift. This rule is designed to provide the Respondent with sufficient opportunity to obtain alternate fill-in staffing, usually from an outside agency. The record shows that employees are well-aware of this requirement and of the adverse consequences in the event they fail to adhere to it, namely, that they will be discharged upon receiving three such written warnings within an 18-month period.[5]

While the Respondent held several employee meetings prior to the strikes, and on several occasions reminded the employees that they should call in if they intended to miss their shifts during the strikes, some employees did so and some did not. Those who did not call in testified either that they believed the Union's 10-day strike notice constituted sufficient advance notification, or specifically asked Union Representative Winston what they should do and were told that the Union's 10-day strike notice had been made on behalf of all employees and therefore it was unnecessary for them to individually call in prior to their scheduled shifts. As noted, only those employees who did not personally call in were given written warnings. The complaint alleges that such written warnings, under the circumstances, are unlawful.

Jones testified that weekends are extremely difficult to staff as the employees, generally, prefer not to volunteer for weekend work. For this reason, each employee is required to work 1 day every other weekend. Further, for purposes of fairness, so that some employees will not have to work more weekend shifts than others, employees are required to make up any weekend work that they miss. Working a weekend shift necessarily results in the elimination of a weekday shift during that week, so that an employee will not be scheduled to work more than 40 hours per week. There is one exception to this weekend make-up requirement: If the employee or a family member is ill and requires care, or if there is some other immediate problem preventing the employee from working, the employee is customarily excused from having to make up the missed weekend shift. Requiring employees to make up for missed weekend shifts is not considered to be a disciplinary measure; rather, it is simply an attempt to distribute weekend work among the employees in an equitable fashion.

[4] However, from questions asked by Respondent's attorney, it appears that the bullhorn and siren were not used from 7 p.m. on September 16, until the next morning.

[5] One striker was terminated and sent home for receiving her third such notice. However it was discovered that this was a mistake because the earliest of her three notices was beyond the 18-month limitation period and should have been removed from her file. Upon discovering this mistake the Respondent immediately notified the employee of its error, and the employee was compensated for the work she missed.

Pursuant to this longstanding weekend shift make-up policy, the Respondent required those striking employees who missed weekend work to make up the weekend shift that they missed. As noted, this necessarily resulted in eliminating one of their weekday shifts. The complaint alleges that requiring strikers to make up missed weekend shifts, under the circumstances, was unlawful.

C. Analysis and Conclusions

The Respondent maintains that it applied its long-established 2 hour call-in policy and its weekend work make-up policy in a routine, non-discriminatory manner, and that it would have taken the same action against any employee regardless of that employee's reason for failing to timely call in. Further, the Respondent apparently argues that the Union's 10-day notices were inadequate as a purported substitute for its call-in policy: thus, the purpose of the policy is to enable the Respondent to know how many employees and which employees, specifically, will be absent from their shift so that it may obtain alternative staffing; simply notifying the Respondent of the time and date of a strike in no way provides such critical information.

The Respondent also maintains that the employees' participation in the strikes, under the circumstances, did not constitute protected concerted activity, and that it was privileged to treat the employees as if they were nonstrikers and the strikes simply had not occurred; therefore, whatever discipline it imposed for the employees' failure to timely call in was not imposed in the context of lawful strike activity. Thus, the Respondent first argues that the misconduct of the Union's business representative on the picket lines, particularly by disturbing the nursing home residents with loud noises and causing them loss of sleep, and by uttering veiled threats of possible harm to Respondent's managers and facilities, taints the entire strike and renders unprotected any employee's participation in the strike even if that employee personally engaged in no misconduct. The Respondent cites no authority for this proposition, and I find it to be without merit.

As a corollary argument, the Respondent maintains that its employees who participated in the strike personally authorized or ratified such strike misconduct because they continued to participate on the picket line when such unprotected activities occurred and did not take any action to cause their representatives to discontinue such misconduct; therefore, the employees' ratification of strike misconduct was itself misconduct. Again, assuming arguendo that the employees were even aware of such activity,[6] the Respondent cites no authority for the proposition that striking employees who fail to attempt to cause their union representatives to discontinue any impermissible picket line conduct are thereby complicit in such misconduct. I also find this contention of the Respondent to be without merit. Further, the Respondent has conceded that it has taken no disciplinary action against any employee for engaging in strike activity of any fashion.

The Respondent maintains the strikes were unprotected because they were calculated to cause the most disruption to the Respondent's operations while providing employees the most advantageous incentives for striking. Thus, the strikes were called to begin at 2 p.m. (prior to the 3:30 p.m. ending time of the day shift), and the Respondent could not know whether the day shift employees would be walking out prior to the end of their shift. Moreover, the strikes were called for weekends in order to enable striking employees to avoid mandatory weekend work and further because it is most difficult for the Respondent to find weekend replacements. And lastly, the very nature of discrete and irregular 2-day strikes effectively deprived the Respondent of its right to permanently replace economic strikers.

It is axiomatic that the very purpose of a strike is to cause disruption, both operationally and economically, to an employer's business operations in order to cause the employer to accede to the union's demands on behalf of the employees it represents. Further, it seems obvious that the greater the number of employees who participate in the strike, the more effective the strike is likely to be in accomplishing this purpose. Clearly, the fact that the strike may have been designed to disrupt the Respondent's operations and at the same time to provide an incentive for employees to participate in the strike does not render the strike unprotected. Moreover, contrary to the Respondent's assertion that it has been effectively deprived of its right to permanently replace employees engaged in periodic 2-day economic strikes, there appears to be no legal impediment to permanently replacing such economic strikers regardless of the length of each strike.

The Respondent argues that the successive 10-day notices announcing a series of weekend strikes are tantamount to the announcement of recurring "partial" or "intermittent" strikes, and that the ensuing strikes therefore constituted unprotected activity; accordingly the discipline for failure to call in was unrelated to any concerted activity protected by the Act.

In *Vencare Ancillary Services*, 334 NLRB 965, 970 (2001),[7] the Board stated:

> Partial strikes, where employees continue working on their own terms, are not protected by Section 7 of the Act. See *Audubon Health Care Center,* 268 NLRB 135, 137 (1983); and *Valley City Furniture Co*., 110 NLRB 1589, 1594-1595 (1954), enfd. 230 F.2d 947 (6th Cir. 1956). Thus, employees lose their statutory protection when they perform only part of their job functions while accepting their pay and avoiding the risks of a total strike. *Vic Koenig Chevrolet*, 263 NLRB 646, 650 (1982).

In *Honolulu Rapid Transit Co.,* 110 NLRB 1806 (1954), the union advised the employer in advance that it intended to engage in consecutive 2-day weekend strikes until a contract was agreed upon. It did strike for 2 days each weekend for 4 consecutive weekends, and thereafter never advised the employer that it intended to discontinue this type of weekly strike activity. The Board determined that this constituted an unprotected intermittent strike, stating at 1809–1810:

> The decision of the employees in this case, implemented in their part-time weekend strike, can only be described as an ar-

[6] None of the employees who testified were even asked whether they were aware of such misconduct by nonemployees.

[7] Enf. denied, 352 F.3d 318 (6th Cir. 2003).

> rogation of the right to determine their schedules and hours of work. . . . employer is not required . . . to alter and adjust his operating schedules and hours to the changing whim which may suit the employees' or a union's purpose . . . and thereby in effect establish and impose upon the employer their own chosen conditions of employment.

In *Polytech, Inc.,* 195 NLRB 695 (1992), employees who were not represented by a union advised their employer that they were refusing to work scheduled overtime that evening and quit work at the end of their regular shift. The Trial Examiner determined that this one instance of refusing to work overtime demonstrated the employees' future intent to engage in similar recurrent partial work stoppages, and that such activity was unprotected. The Board disagreed, stating that a single concerted refusal to work overtime is presumptively protected strike activity, and that (page 696):

> . . . such presumption should be deemed rebutted when and only when the evidence demonstrates that the stoppage is part of a plan or pattern of intermittent action which is inconsistent with a genuine strike or genuine performance by employees of the work normally expected of them by the employer.

In *Polytech* the Board engaged in an analysis of an earlier case, *John S. Swift Co.,* 124 NLRB 394, 396 (1959), enfd. 277 F.2d 641 (7th Cir. 1960), a case in which the employees' single refusal to work overtime "to show the company they were serious about wanting a union contract" (*Swift,* at 395), coupled with their refusal express a willingness to work overtime in the future, was considered to be unprotected activity. The Board in *Polytech,* referencing the *Swift* decision, stated that in Swift "the employees' refusal to work the overtime hours was significant only insofar as it affirmed the employees' previously announced intention to embark on an intermittent or recurring strike as a bargaining tactic."

The Board went on to state, "The holding in *Swift*, that the concerted refusal to work overtime was unprotected, reasons that when employees engage in repeated work stoppages limited to a portion of the working day, they are plainly unwilling to assume the status of strikers—a status contemplating a risk of replacement and a loss of pay. The principle of these cases is that employees cannot properly seek to maintain the benefits of remaining in a paid employee status while refusing, nonetheless, to perform all of the work they were hired to do."

In *Chelsea Homes, Inc*., 298 NLRB 813, 831 (1990), a case involving unorganized employees who engaged in two work stoppages, the Board agreed with the Administrative Law Judge that "two work stoppages, even of like nature, are insufficient to constitute evidence of a pattern of recurring, and therefore unprotected, stoppages. "

In *Robertson Industries*, 216 NLRB 361, 362 (1975), another case involving unorganized employees who also engaged in two work stoppages, the Board states:

> While there is no magic number as to how many work stoppages must be reached before we can say that they are of a recurring nature, certainly the two work stoppages in the case at bar, which involved a total of 2 day's absence from work, do not, in our opinion, evidence the type of pattern of recurring stoppages which would deprive the employees of their Section 7 rights. [Footnote citation omitted)]

Reviewing the foregoing cases, relied upon and/or distinguished by both the General Counsel and Respondent in their respective briefs, it appears that, as the Respondent maintains, *Honolulu Rapid Transit Co.* supra, is most analogous to the instant situation. There the employees were represented by a union, their intent to engage in recurring weekend strike activity was announced by the union and then implemented, the strike activity was in furtherance of their contract demands during ongoing collective-bargaining negotiations, and at no time did the union advise the employer that it intended to discontinue this pattern of conduct.

The same elements relied upon by the Board in *Honolulu Rapid Transit Co.* appear to be present in the instant case: the various foregoing 10-day notices herein constitute proof positive of the Union's similar intent to engage in a series of recurring intermittent work stoppages; such work stoppages were implemented; the Union's intent to continue engaging in repeated work stoppages as a part of its underlying bargaining strategy until a contract was reached, absent any contrary evidence, may be clearly presumed; and the strikes were in furtherance of this strategy. Accordingly, I find that the strike activity in which the employees participated was unprotected activity. Further I find that in the context of such unprotected activity the Respondent did not violate Section 8(a)(1) and (3) of the Act either by issuing warning notices to employees for failure to comply with the 2 hour call-in policy,[8] or by requiring employees to make up the weekend shifts they missed while participating in the strikes.[9]

Accordingly, for the foregoing reasons, I shall dismiss the complaint in its entirety.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[8] Had the strikes been protected activity, I would have found Respondent's 2 hour call-in policy to unduly inhibit employees in the exercise of their Sec. 7 rights in violation of the Act. Thus, the 10-day notices were sufficient to apprise the Respondent that employees, generally, would be participating in the strike, and the 2 hour call-in rule would inhibit employees from deciding, as they were coming to work, to join their fellow employees on the picket line. Moreover, the Respondent could have lawfully polled its employees in advance to determine who would be participating in the strike. *Preterm, Inc*., 240 NLRB 654 (1979).

[9] Even if the strikes were protected activity, I would find that the Respondent did not violate the Act by requiring striking employees to make up their missed weekend shifts. The credible record evidence shows that this policy was not considered disciplinary in nature, and that, contrary to the General Counsel's contention, it was customarily applied in an attempt to equalize the workload among all the employees. While, as pointed out by the General Counsel, there were past occasions when employees who should have been required to make up their weekend shifts were not required to do so, I find that this was through mere inadvertence on the part of one of Respondent's managers. Thus, there is no reason why this weekend make-up policy should not also be applied to strikers.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not violated the Act as alleged in the complaint.

On these findings of fact and conclusions of law, I issue the following recommended:[10]

ORDER

The complaint is dismissed in its entirety.

Dated, March 1, 2007

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.